

GIBSON, DUNN & CRUTCHER LLP
GAIL LEES, SBN 90363
S. ASHLIE BERINGER, SBN 263977
SUSANNAH WRIGHT, SBN 264473
aberinger@gibsondunn.com
swright2@gibsondunn.com
1881 Page Mill Road
Palo Alto, California 94304-1211
Telephone: (650) 849-5300
Facsimile: (650) 849-5333

YELP! INC.
AARON SCHUR, SBN 229566
aschur@yelp.com
706 Mission Street
San Francisco, California 94103
Telephone: (415) 908-3801
Facsimile: (415) 908-3833

Attorneys for Defendant YELP! INC.

ONGARO BURTT & LOUDERBACK LLP
DAVID R. ONGARRO, SBN 257928
AMELIA D. WINCHESTER, SBN 257928
585 Market St., Suite 610
San Francisco, CA 94105
Tel: (415) 433-3900 Fax: (415) 433-3950

Attorneys for Plaintiffs Boris Y. Levitt, *et al.*

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

BORIS Y. LEVITT D/B/A RENAISSANCE
RESTORATION, CATS AND DOGS
ANIMAL HOSPITAL, INC., TRACY CHAN
D/B/A MARINA DENTAL CARE, and JOHN
MERCURIO D/B/A WHEEL TECHNIQUES;
on behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

YELP! INC.; and DOES 1 through 100,
inclusive,

Defendants.

Case No. CV 10-01321 EMC
Consolidated with CV 10-02351 EMC

CLASS ACTION

**JOINT CASE MANAGEMENT
STATEMENT**

1 In accordance with the Court's June 6, 2011 Reassignment Order, plaintiffs Boris Levitt, Cats
 2 and Dogs Animal Hospital, Inc., Tracy Chan, and John Mercurio ("Plaintiffs") and defendant Yelp!
 3 Inc. ("Yelp" and collectively with Plaintiff, the "Parties") hereby submit this Joint Case Management
 4 Statement pursuant to Federal Rule of Civil Procedure 26(f) and Civil Local Rule 16-9.

5 Pursuant to Federal Rule of Civil Procedure 26(f), the Parties held a telephonic meeting of
 6 counsel on Thursday, June 16, 2011. David R. Ongaro and Amelia D. Winchester participated for
 7 Plaintiff. Susannah S. Wright participated for Yelp.

8 **I. Date Case Was Filed**

9 The original complaint in this matter was filed by plaintiff Cats and Dogs Animal Hospital,
 10 Inc. ("Cats and Dogs") on February 23, 2010 in the United States District Court for the Central
 11 District of California. A second complaint was filed by plaintiff Boris Y. Levitt ("Levitt") on March
 12 12, 2010, in San Francisco Superior Court. On March 16, 2010, plaintiff Cats and Dogs amended its
 13 complaint in the Central District. On March 29, 2010, the Levitt complaint was removed to the
 14 United States District Court for the Northern District of California before Judge Patel, and on May 3,
 15 2010, the Cats and Dogs matter was likewise transferred to the Northern District, where it was
 16 subsequently reassigned to Judge Patel.

17 Judge Patel granted Yelp's motion to consolidate the two actions on July 20, 2010, appointed
 18 Ongaro Burtt LLP as lead plaintiffs' counsel on August 24, 2010, and ordered Plaintiff to file a
 19 consolidated amended complaint. Plaintiffs filed their First Amended and Consolidated Class Action
 20 complaint on September 23, 2010. After Yelp filed a motion to dismiss the complaint, Plaintiffs
 21 voluntarily withdrew their complaint and filed a Second Amended and Consolidated Class Action
 22 Complaint on November 22, 2010 that included many changes, including the removal of causes of
 23 action for Intentional Interference with Business Advantage and violations of California Business and
 24 Professions Code section 17500. Yelp filed a motion to dismiss the Second Amended Complaint,
 25 and on March 22, 2011, Judge Patel granted Yelp's motion, dismissing Plaintiffs' complaint, with
 26 leave to amend. Plaintiffs filed their Third Amended and Consolidated Complaint on May 23, 2011.

II. Parties to the Action

The four named plaintiffs in the Third Amended and Consolidated Class Action Complaint are: Boris Y. Levitt d/b/a Renaissance Restoration, Cats and Dogs Animal Hospital, Inc., Tracy Chan d/b/a Marina Dental Care, and John Mercurio d/b/a Wheel Techniques. Yelp! Inc. is the sole defendant.

III. Summary of Claims and Events Underlying the Action

A. Yelp's Statement

Plaintiffs' Third Amended Complaint (the sixth complaint filed by plaintiffs in this matter), includes putative causes of action for violation of California Business and Professions Code section 17200 and for Civil Extortion and Attempted Civil Extortion.

Yelp is a leading Internet review website that allows members of the public to read and write online reviews about their experiences with local businesses. The reviews on Yelp's website are written by members of the public, who rate local businesses on a scale of one to five stars. As disclosed on Yelp's website, well over 18 million reviews have been posted to Yelp's website, and the overwhelming majority of these reviews are positive – approximately 83% of reviews are 3 stars or higher, whether or not the business advertises on Yelp. Tens of millions of people use Yelp's website each month—over 50 million in March 2011.

The integrity of these reviews has fueled the success of Yelp's service, and Yelp goes to great lengths to combat efforts by some businesses (including some of the Plaintiffs here) to post and solicit fake or unreliable reviews. As Plaintiffs concede, Yelp discloses on its website that it "has an automated filter that suppresses a small portion of reviews – it targets those suspicious ones you see on other sites." The review filter is critical to ensuring that consumers see the most reliable reviews posted on Yelp, rather than those that might have been written by a business owner seeking to deceptively promote its own business or tarnish a competitor. The filter does not take into account whether or not a business advertises with Yelp, and instead filters reviews based on an automated analysis of "how established a particular reviewer is." As Yelp discloses on its website, because a reviewer's activities and "trustworthiness" can vary over time, "reviews can disappear and reappear over time" based on the reviewer's varying involvement with Yelp.

Yelp also provides businesses with an opportunity to advertise on Yelp.com. Advertisers are featured in clearly designated sponsored results at the top of Yelp search results and on related business pages. In addition, advertising businesses are able to “enhance [their] business page” with a photo slideshow and video, and to prevent competitors’ advertisements from appearing on their business pages. Whether or not a business advertises on Yelp has no effect on the automated review filter.

At bottom, Plaintiffs’ claims seek to suppress legitimate – and protected – online consumer commentary about their businesses and hinder Yelp’s good faith efforts to protect consumers from potentially unreliable information. While Yelp strives to provide dependable service for consumers, Plaintiffs complain that they were harmed by negative consumer reviews or that positive reviews were removed as unreliable by Yelp’s automated filter. As Judge Patel held in her March 22, 2011 Order, however, Plaintiffs fail to allege a coherent – or actionable – theory that Yelp engaged in any unlawful conduct or is responsible for their speculative injuries. Indeed, Plaintiffs have failed to make a single threat of unlawful injury, and their allegations fail to establish a non-speculative basis for concluding that the removal of negative reviews or publication of positive reviews was due to anything other than the standard operation of Yelp’s automated filter. Specifically, Judge Patel found Plaintiffs’ claims that Yelp “deliberately manipulates reviews” or “manufactures negative reviews” to be “entirely speculative,” and she was “unable to reasonably attribute the appearance or disappearance of various user reviews to Yelp’s wrongdoing as opposed to its efforts to filter out unreliable reviews.” *See* March 22, 2011 Order, Docket Number 70, at 18 and 20.

B. Plaintiffs’ Statement

Plaintiffs’ Third Amended and Consolidated class action complaint alleges claims for 1) violation of business and professions code section 17200; 2) civil extortion; and 3) attempted civil extortion. Plaintiffs allege that Yelp manipulates the reviews of business nationwide to instill fear in businesses that if they do not purchase advertising, Yelp will manipulate their reviews - in a manner that does not comply with its Review Terms - so that, for example, 1) positive reviews are removed or filtered; 2) negative reviews are suddenly posted after a business declines to purchase advertising, sometimes by Yelp or by individuals acting through Yelp; and 3) negative reviews are posted or

1 remain on a business's Yelp review page even though they do not comply with Yelp's terms and
 2 conditions. Plaintiffs allege that Yelp's manipulation of reviews is done strategically, and in
 3 conjunction with, or under the guise of its automated review filter, as a threat to induce business
 4 owners to pay for advertising. Business owners fear that if they do not pay Yelp for advertising, Yelp
 5 will maintain overall negative star ratings on their Yelp review pages, which will result in a decrease
 6 in business and patrons.

7 Some examples of Plaintiff's specific allegations regarding Yelp's conduct include the
 8 following: Plaintiff Levitt declined to purchase advertising from Yelp, and within two days, six out
 9 of seven 5-star reviews were removed from his business's Yelp review page. Cats and Dogs received
 10 a negative review, which Yelp removed, upon request, because it violated Yelp's terms and
 11 conditions. Soon after, Yelp asked Cats and Dogs to purchase advertising. Cats and Dogs declined,
 12 and within a week, the review that had been removed for violating Yelp's Review Terms was
 13 inexplicably re-posted by Yelp. John Mercurio declined to purchase advertising and within minutes,
 14 a one-star negative review was moved to the top of his business's Yelp review page. Tracy Chan
 15 declined to purchase advertising and within two to three days, Yelp removed nine 5-star reviews from
 16 her business's Yelp review page.

17 Many stories have been published that describe similar allegations relating to Yelp's conduct.
 18 *See, e.g. Andrew LaVallee, Yelp Disputes Extortion Story, WALL STREET JOURNAL, February 20,*
 19 *2009, <http://blogs.wsj.com/digits/2009/02/20/yelp-disputes-extortion-story>.*

20 **IV. Relief Sought and Damages Claimed**

21 Plaintiffs request certification of this action as a class action, consisting of two subclasses
 22 (one consisting of businesses that advertised on Yelp and one consisting of businesses that did not),
 23 with named Plaintiffs certified as class representatives. Plaintiffs also request that Yelp be enjoined
 24 from engaging in the alleged activity complained of in the Third Amended Complaint. Plaintiffs
 25 further request 1) that Yelp be ordered to disgorge "ill-gotten gains"; 2) an award of restitution; 3)
 26 pre- and post-judgment interest; 4) damages and punitive damages "in an amount to be proved at
 27 trial"; and 5) an award of all costs and expenses, including attorneys' fees and fees permitted under
 28 California Code of Civil Procedure section 1021.

1 Plaintiffs have not calculated or otherwise quantified these alleged damages.

2 **V. Status of Discovery**

3 **A. Yelp's Statement**

4 Judge Patel held an initial case management conference in this action on July 19, 2010.¹
 5 Pursuant to Judge Patel's August 24, 2010 Order Appointing Lead Counsel order, all discovery in
 6 this matter is stayed until motions to dismiss have been adjudicated and any answer has been filed.
 7 See Order Re: Appointment of Lead Counsel, Docket Number 96, at 4. Moreover, in the Parties'
 8 previously filed July 12, 2010 Joint Case Management Statement, the Parties agreed that "discovery
 9 should be deferred until the pleadings have closed (*i.e.* until after any motions to dismiss are decided
 10 and, if necessary, Yelp has filed an Answer in this action)." See July 12, 2010 Joint Case
 11 Management, Docket Number 27, at 8 [attached hereto]. Plaintiffs further reiterated this agreement
 12 in their own discovery plan, filed on July 26, 2010, stating that no discovery would commence until
 13 "pleadings are finalized." See Plaintiff Levitt's Discovery Plan, Docket No. 34, at 2.

14 In addition, Judge Patel's order, the Joint Case Management Statement, and Plaintiffs'
 15 discovery plan each provided that any discovery following any answer in this action is to be
 16 bifurcated, such that the only discovery permissible after the pleadings are closed (if ever) is "class-
 17 related discovery." See Order Re: Appointment of Lead Counsel, Docket Number 96, at 4.
 18 Moreover, at the March 7, 2011 hearing (prior to her order dismissing Plaintiffs' complaint), Judge
 19 Patel reiterated that the terms of her August 24, 2010 order (which stayed and bifurcated discovery)
 20 were still in effect.

21 **B. Plaintiffs' Statement**

22 During the March 7, 2011 hearing on Defendant's Motion to Dismiss Plaintiffs' Second
 23 Amended Complaint, Judge Patel ordered that discovery could commence in the case once the Court
 24 ruled on Defendant's motion to dismiss. See Transcript of Proceedings, Dkt. No. 69. Specifically,
 25

26 _____
 27 ¹ At the July 19, 2010 Case Management Statement, Judge Patel stated, unequivocally, that
 28 "discovery is not appropriate when you're looking at a motion to dismiss." See Transcript of
 Proceedings, Dkt. No. 32 at 21.

1 the Court, when asked by Plaintiff's counsel, affirmed that, consistent with her prior order, that "after
2 the Court's ruling on this, then discovery could take place." *Id.* 31:9-25.

3 Judge Patel's August 24, 2010 order provided that, "Class-related discovery may commence
4 subsequent to the Court's order adjudicating the motion to dismiss if one is filed, or subsequent to the
5 filing of an answer."² Accordingly, Judge Patel has twice ruled that discovery could commence once
6 the Order on Defendant's Motion to Dismiss was issued, which occurred on March 22, 2011.

7 On May 4, 2011 Plaintiff served one interrogatory on Yelp. On May 23, 2011, Defendant
8 served objections and responded that "Yelp will provide any relevant information that is responsive
9 to this Interrogatory at such time, as any, as it is required to do so under the terms of the Court's
10 August 24, 2010 Order.

11 Given that Judge Patel issued an order on Defendant's Motion to Dismiss, it is Plaintiff's
12 position that discovery may commence, and is in the process of meeting and conferring with Yelp
13 regarding this issue.

14 **VI. Procedural History**

15 Prior to their transfer to the Northern District of California, three complaints had been filed by
16 some of the plaintiffs (one by plaintiff Levitt and two by plaintiffs Cats & Dogs). After the original
17 complaints were transferred to the United States District Court of the Northern District of California
18 and assigned to Judge Patel, the parties filed a Joint Case Management Conference Statement with
19 the court on July 12, 2010. A copy of that previous statement is attached for the Court's reference.

20 Judge Patel held a Case Management Conference on July 19, 2010, and on July 20, 2010, she
21 granted Yelp's motion to consolidate the two actions. On August 24, 2010, Judge Patel appointed
22 Ongaro Burt LLP as plaintiffs' lead counsel and ordered that Plaintiffs file a consolidated complaint
23 within 30 days. In that same August 24, 2010 order, Judge Patel also ordered that "class-related
24 related discovery may commence subsequent to the court's order adjudicating the motion to dismiss
25 if one is filed, or subsequent to the filing of an answer."

26 _____
27 ² Yelp's representation of Plaintiff's discovery plan is not entirely accurate. Plaintiff stated only, in
28 the anticipated discovery section that "Once the pleadings are finalized, Levitt will engage in written
discovery." The plan was submitted nearly one year ago, and the case has changed since that time.

1 Plaintiffs filed their First Amended and Consolidated Class Action complaint on September
 2 23, 2010. After Yelp filed a motion to dismiss the complaint on October 22, 2010, Plaintiffs
 3 voluntarily withdrew their complaint and filed a Second Amended and Consolidated Class Action
 4 Complaint on November 22, 2010. Yelp filed a motion to dismiss this Second Amended Complaint,
 5 and on March 7, 2011, Judge Patel held a hearing on the motion to dismiss.
 6 On March 22, 2011, Judge Patel granted Yelp's motion to dismiss in its entirety, dismissing
 7 Plaintiffs' complaint, with leave to amend. The Parties stipulated to an extension of time for
 8 Plaintiffs to file an amended complaint and for Yelp to file a responsive pleading. Pursuant to an
 9 April 18, 2011 order by Judge Patel, Plaintiffs were to file an Amended Complaint no later than May
 10 23, 2011, and Yelp is to file a responsive pleading no later than July 22, 2011.

11 Plaintiffs filed their Third Amended and Consolidated Complaint on May 23, 2011. Yelp will
 12 file a motion to dismiss this latest complaint no later than July 22, 2011.

13 **A. Yelp's Statement Regarding the Court's Order and Plaintiffs' Complaint**

14 In her March 22, 2011 order dismissing Plaintiffs' complaint, Judge Patel found that Plaintiffs
 15 had failed to plead any plausible cause of action, and specifically, that Plaintiffs' allegations were
 16 insufficient to plead extortion for purposes of Plaintiffs' UCL claim because they did not allege an
 17 express threat or any implied threat of harm.

18 Judge Patel granted Plaintiffs' leave to amend their complaint based upon representations
 19 made by Plaintiffs' counsel at the March 7, 2010 hearing that "continued investigation has produced
 20 additional facts that would bolster plaintiffs' allegations." *See* March 22, 2010 Order, Docket No. 70,
 21 at 20. Plaintiffs' latest complaint (the sixth filed by Plaintiffs in this action), however, provided no
 22 additional facts concerning three of the previously named plaintiffs (Boris Levitt, Cats and Dogs, and
 23 Tracy Chan) and added only one new plaintiff, John Mercurio, who likewise fails to allege any
 24 express or implied threat.

25 **B. Plaintiffs' Statement**

26 Judge Patel's March 22, 2011 order granted Plaintiffs leave to amend their complaint and
 27 stated that "[t]he court is not persuaded that amendment would be futile and will provide plaintiffs
 28 with the opportunity to cure the deficiencies addressed above." *See* March 22, 2010 Order, Dkt. No.

70, at 20. Plaintiffs therefore, allege new facts and allegations, which address the Court's rulings, in their Third Amended Complaint.

VII. Other Deadlines

Yelp is required to file a response to Plaintiffs' Second Amended Consolidated Complaint no later than July 22, 2011.

VIII. Modification of Dates

No request for modification of the above-mentioned dates is requested.

IX. No Consent to Magistrate Judge

The Parties do not consent to a magistrate judge for trial.

X. Settlement Conference

The Court has not previously conducted a settlement conference in this case.

XI. Case Management Conference

The parties agree that there is no immediate need for a case management conference to be scheduled and that any conference should be scheduled for a date following the hearing date on Yelp's anticipated motion to dismiss.

Respectfully Submitted,

DATED: June 21, 2011

GIBSON, DUNN & CRUTCHER LLP

By: /s/ Susannah S. Wright

S. Ashlie Beringer
Susannah Stroud Wright

Attorneys for Defendant Yelp! Inc.

DATED: June 21, 2011

ONGARO BURTT & LOUDERBACK LLP

By: /s/ David R. Ongaro

David R. Ongaro
Amelia D. Winchester

Attorneys for Plaintiffs Boris Y. Levitt *et al.*

ATTESTATION PURSUANT TO GENERAL ORDER 45

I, Susannah S. Wright, attest that concurrence in the filing of this Joint Case Management Statement has been obtained from each of the other signatories.

/s/ Susannah S. Wright
Susannah Stroud Wright

Yelp - Joint CMC Statement.doc